

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WERNER GLASS & MIRROR, INC.	:	SMALL CLAIMS DETERMINATION DTA NO. 819893
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1998 through November 30, 2000.	:	

Petitioner, Werner Glass & Mirror, Inc., 405 Lake Ave., St. James, New York 11780-2207, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1998 through November 30, 2000.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on August 27, 2004 at 9:15 A.M. and continued to conclusion before the same Presiding Officer on January 18, 2005 at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York. Petitioner appeared at both hearings by Golub, LaCapra, Wilson & DeTiberiis, LLP (Joseph LaCapra, CPA). The Division of Taxation appeared at both hearings by Christopher C. O'Brien, Esq. (Robert DeFilippis and Joseph Miller).

Petitioner's initial brief, prepared by Golub, LaCapra, Wilson & DeTiberiis, LLP (Joseph LaCapra, CPA), was submitted on May 31, 2005. The Division of Taxation did not file a brief. Petitioner's final brief, prepared by its new representative, Randy Bruce Blaustein, Esq., was filed by the September 15, 2005 due date and it is this date that commences the three-month period for the issuance of this determination.

ISSUES

I. Whether the Division of Taxation's use of a test period audit to estimate taxes due was a statutorily authorized external index acceptable for estimating taxes due pursuant to Tax Law § 1138(a)(1) and, if not, whether the assessment should be invalidated as a matter of law.

II. Whether the installation of a mirror on a wall constitutes a capital improvement to real property.

III. Whether the Division of Taxation properly determined that the entire sum of underreported gross sales and all of the undocumented nontaxable sales as disclosed by its audit were taxable sales.

IV. Whether the Division of Taxation properly computed the use tax due on materials which were incorporated into capital improvements.

V. Whether petitioner has established reasonable cause for the waiver of penalties and the reduction of interest from statutory to minimum rates.

FINDINGS OF FACT

1. Petitioner, Werner Glass and Mirror, Inc., was incorporated in the State of New York on October 5, 1976, and its business activities include the sale and installation of glass and mirror products for both residential and commercial customers. Petitioner also sells glass and mirror products to homeowners and contractors where the installation is performed by the customer or contractor. The advertisement which petitioner placed in the local telephone directory indicates that it provides 24-hour, 7-day emergency service, that it serves all of Long Island and that its products include table tops, insurance claims, store fronts, etching, auto glass, fireplace enclosures, picture framing, wardrobe doors, shower enclosures, storm windows, screens, storm doors, vinyl windows and custom blinds.

2. In April 2001, the Division of Taxation (“Division”) commenced a field audit of petitioner’s books and records to determine if it had collected and remitted the proper sales and use taxes due for the period March 1, 1998 through November 30, 2000. On audit, the Division determined that petitioner failed to maintain complete and adequate books and records and petitioner concedes that its records were incomplete and inadequate.

3. Since petitioner’s books and records were admittedly incomplete and inadequate, the Division resorted to the following audit methodologies to determine the sales and use taxes due:

_____ **(A) Underreported Gross Sales** - In reconciling gross sales, the Division noted that gross sales for the audit period per books and records totaled \$2,122,884.00, while gross sales as reported on petitioner’s sales and use tax returns totaled \$1,779,615.00. The Division deemed the entire \$343,269.00 of underreported gross sales to be taxable sales, and by applying the 8.25% tax rate to the \$343,269.00 it computed additional sales tax due of \$28,319.69.

_____ **(B) Undocumented Nontaxable Sales Per Test Period** - For the test quarter ending May 31, 2000, petitioner reported nontaxable sales of \$135,978.00. After reviewing nontaxable sales records for the test quarter, the Division determined that petitioner had sales records for \$102,182.00 of claimed nontaxable sales and that it was missing sales invoices or other sales records with respect to the remaining \$33,796.00, which amount represents 24.85% of claimed nontaxable sales for the test quarter. The Division multiplied reported nontaxable sales for the entire audit period of \$1,688,077.00 by 24.85% to compute \$419,487.00 of undocumented nontaxable sales. The Division held that the entire \$419,487.00 of undocumented nontaxable sales were taxable sales, and by applying the 8.25% tax rate to \$419,487.00 it computed additional sales tax due of \$34,607.68.

(C) Disallowed Nontaxable Sales Per Test Period - For the test quarter ending May 31, 2000, Division performed a detailed review of the \$102,182.00 of claimed nontaxable sales for which petitioner had supplied sales records. This review determined that \$6,375.80 of the \$102,182.00 of claimed nontaxable sales, or 6.24%, were taxable sales. The Division applied the 6.24% rate of disallowance to adjusted claimed nontaxable sales for the audit period of \$1,268,590.00 (\$1,688,077.00 - \$419,487.00) to calculate disallowed nontaxable sales of \$79,160.00. By applying the 8.25% tax rate to the \$79,160.00 of disallowed nontaxable sales, the Division determined a tax due of \$6,530.70.

(D) Use Tax on Materials Used in Capital Improvements - Based on its test of sales for the quarter ending May 31, 2000, the Division determined that 88.06% of petitioner's sales were private capital improvement sales. Audited nontaxable sales for the audit period of \$1,268,590.00 were multiplied by 88.06% to compute private capital improvement sales for the audit period of \$1,117,120.00. By dividing purchases for the audit period of \$858,424.00 by audited gross sales for the audit period of \$2,122,884.00, it was determined that the percentage of purchases to sales was 40.44%. The Division next applied the 40.44% ratio of purchases to sales to the \$1,117,120.00 of private capital improvement sales to calculate that \$451,763.00 of purchases were applicable to private capital improvement sales. By reviewing purchase invoices for the 2000 calendar year, totaling \$340,211.74, the Division determined that petitioner had paid sales tax on 15% of purchases and that the remaining 85% of purchases were made tax free. Total purchases for the audit period of \$858,424.00 were multiplied by 15% to calculate that petitioner had paid tax on \$128,764.00 of purchases made during the audit period. The \$128,764.00 of purchases upon which tax had been paid was subtracted from the \$451,763.00 of total purchases applicable to private capital improvement sales to compute that \$322,999.00 of

materials were used in private capital improvement sales and that no tax had been paid thereon.

Applying the 8.25% tax rate to the \$322,999.00 produced a use tax due of \$26,647.42.

(E) Fixed Asset Acquisitions - The Division reviewed petitioner's purchases of fixed assets for the entire audit period and determined that it had acquired four assets, totaling \$4,485.00, upon which no sales or use taxes had been paid. The tax due on fixed asset acquisitions totaled \$370.02. Petitioner concedes that it is liable for payment of the \$370.02 of tax due on fixed asset acquisitions.

4. On October 7, 2002, the Division issued a Notice of Determination ("Notice") to petitioner asserting that \$96,475.52 of tax was due, together with penalty of \$38,590.24 and interest of \$42,647.44, for a total amount due of \$177,713.20. Petitioner timely contested the Notice by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). In response to petitioner's contention that the three-month test period was not representative of its business, BCMS directed the Division to expand the test period to also include the quarter ending August 31, 2000. By expanding the test period to include the quarter ending August 31, 2000, the tax due was reduced by \$6,492.09, from \$96,475.52 to \$89,983.43. The expanded test period did not affect the \$370.02 of tax due on fixed asset acquisitions or the \$28,319.69 of tax due resulting from the increase in gross sales. The expanded test period changed the percentage of undocumented nontaxable sales from 24.85% to 19.59%; increased the percentage of disallowed nontaxable sales from 6.24% to 6.41% and decreased the percentage of private capital improvement sales from 88.06% to 82.71%. Although BCMS did not incorporate the changes made as the result of the expansion of the test period into a Conciliation Order, the Division, at the hearing held on August 27, 2004, stipulated to the reduced tax due of \$89,983.43.

5. The Division, in its review of nontaxable sales records for the quarters ending May 31, 2000 and August 31, 2000, examined 426 sales invoices, which invoices reported a total of \$241,221.56 in nontaxable sales. Petitioner's sales and use tax returns for these two test quarters reported nontaxable sales of \$299,987.00 and thus petitioner was able to supply sales records for 80.41% ($\$241,221.56 \div \$299,987.00$) of reported nontaxable sales. As noted in Finding of Fact "4", the Division held that 19.59%, or \$330,694.00 ($\$1,688,077.00 \times 19.59\%$), of claimed nontaxable sales for the entire audit period were undocumented and it deemed these undocumented claimed nontaxable sales to be taxable sales.

6. The Division's review of the \$241,221.56 in claimed nontaxable sales for the two test quarters for which petitioner was able to provide sales records produced the following results:

Type of sale	Amount	Percentage
Private capital improvements	\$199,512.49	82.71%
Sales to exempt organizations	18,894.15	7.83%
Resales	6,696.91	2.79%
Other sales	620.00	0.26%
Disallowed nontaxable sales	15,468.14	6.41%
Total	\$241,221.56	100.00%

7. The disallowed nontaxable sales of \$15,468.14 shown in the above table represents the total of a significant number of sales invoices which petitioner had considered to be nontaxable and which the Division, on audit, deemed to be taxable sales. Petitioner initially contested the Division's reclassification of 69 sales invoices from nontaxable to taxable status and Appendix A attached to this determination contains a detailed list of the 69 sales invoices in question. During the course of the two hearings held herein, petitioner conceded the taxable status of 7 of the 69 sales invoices in dispute and the Division conceded the nontaxable status of 10 of the 69

sales invoices. Thus, there remain 52 sales invoices in question where petitioner claims the transaction was nontaxable because: (a) the sale was a capital improvement; (b) the sale was for resale; (c) the sale was to a tax exempt organization; or (d) it had received a Contractor Exempt Purchase Certificate from the contractor.

8. The sales during the test period which petitioner claims were nontaxable capital improvements primarily consisted of the sale and installation of mirrors. These mirrors were generally glued to a wall and also fastened with clips which were screwed into the wall. The Division concedes that the mirrors were permanently affixed to the wall and that the removal of the mirror would cause substantial damage to the wall. The Division asserts that the mirrors do not substantially add to the value of the property and therefore do not qualify as a capital improvement. Petitioner, on the other hand, maintains that the mirrors significantly added to the value of the property and, as such, qualify as a capital improvement. Appendix A contains 18 sales invoices where petitioner sold and installed mirrors for private customers. Although petitioner did not receive a Certificate of Capital Improvement for any of these 18 sales, it considered all 18 sales to be nontaxable capital improvements. Petitioner's average sales price for the mirror and installation with respect to these 18 sales was \$130.72.

9. Appendix A also contains 17 sales invoices where petitioner asserts that it made nontaxable sales of tangible personal property to registered vendors, other than contractors, who had issued properly completed resale certificates. The record herein contains resale certificates for Lake Avenue Antiques (2 sales), Flo Kemp (11 sales), and Perma Ceran Ent. (1 sale). No resale certificates were offered in evidence for the one sale made to Braiotta Studios, the one sale made to Sama Millwork or the one sale made to Wuhza Window.

10. Petitioner claims in Appendix A that there were 14 sales made to various contractors and that these sales were nontaxable as (a) capital improvements; or (b) exempt pursuant to a Contractor Exempt Purchase Certificate. A total of eight sales, six to Kundig Construction, one to On the Level Homes and one to Totter, represent the sale of tangible personal property only. There were no contractor exempt purchase certificates submitted in evidence for any of these eight sales. Appendix A reflects one sale to EGM Construction Corp. where petitioner, acting as a subcontractor to EGM Construction Corp., furnished and installed custom window treatments. No Contractor Exempt Purchase Certificate was provided for this transaction. Appendix A also reflects four sales to NDA Contracting, two of which involved the sale of tangible personal property, one which involved a re-screen for \$42.00 and one where petitioner, acting as a subcontractor to NDA Contracting, replaced safety glass in the front door of a rental unit. Petitioner submitted in evidence one Contractor Exempt Purchase Certificate from NDA Contracting which was undated, supplied some four years after the sale was made, failed to provide the project name, location or prime contractor, and failed to check a box or boxes under which exemption from taxation was claimed. The last disputed sale to a contractor was one sale to Associated Construction where petitioner, once again acting as a subcontractor, furnished and installed “clear laminated safety glass replaced in second floor opening.” The Contractor Exempt Purchase Certificate submitted in evidence from Associated Construction was dated more than four years after the sale and failed to provide its sales tax vendor identification number.

11. The last three of the 52 disputed sales involve the following transactions:

(a) a sale to St. James Plaza in the sum of \$208.00 which petitioner claims is an exempt organization, thus making this a nontaxable sale. An exempt organization certificate was not submitted in evidence from St. James Plaza to support petitioner's position.

(b) a \$115.00 sale to Café LaStrada wherein petitioner applied the Café LaStrada logo to a mirror in the front lobby area using a custom etch-like application. Café LaStrada did not furnish petitioner with a capital improvement certificate for this transaction and the record herein does not disclose whether Café LaStrada owns or rents the building and, if rented, the terms of the lease agreement with respect to leasehold improvements.

(c) a \$70.00 sale to Markar Jewelers where petitioner furnished and installed two 45" by 6 11/16" one-quarter inch "clear mirror[s] for showcase sliders with clear shoes & wheels." As was the case with Café LaStrada, Markar Jewelers did not furnish petitioner with a capital improvement certificate for this transaction and the record herein does not disclose whether Markar Jewelers owns or rents the building and, if rented, the terms of the lease agreement with respect to leasehold improvements.

12. Although petitioner was incorporated in New York on October 5, 1976, William O. Werner, Sr.¹ started Werner Glass in 1961 at the age of 21 years old and he has been continuously involved in the business since its inception. Petitioner utilized the services of a certified public accountant to assist in its bookkeeping, advise on tax matters and prepare tax returns. Through Mr. Werner's testimony at the two hearings held herein, it was clear that he

¹ William O. Werner, Sr., was president and sole shareholder of petitioner during the period at issue and at the hearing held on August 27, 2004 he conceded that he was personally liable for payment of any taxes determined to be due from petitioner. Accordingly, although petitioner's new representative raised the issue concerning Mr. Werner's personal liability in the final brief, this issue will not be addressed further since it was conceded by Mr. Werner.

consistently applied the same standards to all transactions in determining which sales were, according to his understanding, capital improvements.

SUMMARY OF THE PARTIES' POSITIONS

13. Initially, petitioner argues that the Division was required, pursuant to Tax Law § 1138(a)(1), to make its estimate of any taxes due “on the basis of external indices” and since the Division’s test period method was not based on the statutorily required external indices, the audit was flawed as a matter of law. Since the audit method selected was not authorized by law, petitioner maintains that it was not put to the standard of having to prove by clear and convincing evidence that the audit method was erroneous and that no taxes were due.

14. With respect to the issue concerning whether the installation of a mirror on a wall constitutes a capital improvement, petitioner argues that there is little or no guidance as to what elements should be considered in determining if a change or addition to real property “substantially” adds to its value. Petitioner relies on Mr. Werner’s testimony based on his 40 plus years of experience in this business to establish that the mirrors “substantially” added to the value of the real property. Petitioner notes that the Division offered no reason, explanation, guidance or dollar amount which would not make an installation a “substantial” improvement to the property and, absent any guidelines, it must defer to the sensibility and reasonableness of petitioner’s position.

15. Petitioner also asserts that it was erroneous for the Division to consider all of the underreported sales and all of the undocumented nontaxable sales to be taxable sales. Petitioner points out that the Division’s own test period audit revealed a substantial percentage of nontaxable sales and that it is reasonable to apply the audited nontaxable percentage to the underreported sales and the undocumented nontaxable sales. The Division argues that Tax Law

§ 1132(c) provides that all sales are presumed taxable and that petitioner bears the burden of proving that the sales in question were not taxable. Without sales invoices or other acceptable sales records for the underreported sales and the undocumented nontaxable sales, the Division maintains that it must hold these sales as taxable sales. As further support for its position, the Division notes that its audit produced a taxable sales percentage of 44% and that for quarters after the audit was completed petitioner was reporting a taxable sales percentage of 40%.

16. With respect to the Division's calculation of the use tax due on materials incorporated into capital improvements, petitioner notes that the Division calculated that material purchases were 40.44% of total sales by dividing material purchases for the audit period (\$858,724.00) by audited gross sales for the audit period (\$2,122,984.00). Petitioner argues that there is no meaningful relationship between materials purchased and total sales for the purpose of determining materials which were incorporated into capital improvements. Petitioner suggests that the Division should have performed a detailed review of purchases to make a more accurate determination as to those purchases which were used in capital improvements and that the method employed by the Division is without merit and should therefore be eliminated from the assessment as a matter of law.

17. Finally, petitioner believes that reasonable cause exists to waive penalties and reduce interest to minimum rates. It is petitioner's position that its interpretation of the law and rules governing capital improvements was reasonable, that its interpretation was consistent with industry standards and that its accountant's advice concerning the tax treatment of capital improvements was legally sound. Petitioner contends that it consistently applied its understanding of capital improvements to all sales throughout the audit period, thus evidencing a genuine attempt to comply with the provisions of the Tax Law. Petitioner also notes that there is

no evidence in the record that would suggest or prove that it did not substantially comply with all of its tax obligations to the State of New York.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 1138(a)(1) provides as follows:

If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due *shall* be determined by the commissioner from such information as may be available. If necessary, the tax *may* be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and services, number of employees, or *other factors*. (Emphasis added.)

Petitioner's argument that Tax Law § 1138(a)(1) requires the Division to use only external indices when it estimates taxes due and that the test period method employed in the instant matter does not qualify as an external index, thereby rendering it impermissible as a method to estimate taxes due, is without merit. In the instant matter, there is no dispute that petitioner's books and records were inadequate and incomplete, thus preventing the Division from verifying taxable sales and purchases and otherwise conducting a detailed audit from which the exact amount of tax due could be determined. Accordingly, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221). Moreover, in *Matter of Continental Arms Corp. v. State Tax Commn.* (72 NY2d 976, 534 NYS2d 362), the Court of Appeals specifically sanctioned the use of a test period audit as an appropriate method to estimate taxes due under Tax Law § 1138(a)(1). Petitioner's strained interpretation of Tax Law § 1138(a)(1) is simply not supported by a careful reading of the statute or by the substantial body of case law developed over the last 30 years.

B. Tax Law § 1105(c)(3) imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property. The term “capital improvement” is defined in Tax Law § 1101(b)(9)(i) as:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

C. Petitioner’s position that the replacement of a mirror substantially adds to the value of the real property cannot be accepted. While there is no dispute between the parties that a mirror added to a room and permanently affixed to the wall in new construction qualifies as a capital improvement, it is difficult to discern how a mirror replacement, at an average cost of \$130.72 during the six-month test period, can be considered substantial. If the replacement of wall-to-wall carpeting does not qualify as a capital improvement (20 NYCRR 527.5[a][5]), then the replacement of a mirror must also be held to constitute a taxable sale. Petitioner could have insulated itself from this liability had it timely obtained a properly completed Certificate of Capital Improvement from its private customers; however, no such certificates were offered in evidence with respect to the sales made to private customers (20 NYCRR 541.5[a][4][i]).

D. With respect to the sales made to registered vendors who are not contractors, petitioner is allowed nontaxable resale status with respect to those sales where petitioner provided a properly completed resale certificate. Those sales for which no resale certificates were submitted are considered taxable sales.

E. For all sales made to contractors, petitioner is required to collect sales tax (20 NYCRR 541.1[b]) unless it receives a timely and properly completed Contractor Exempt Purchase Certificate for each individual sale or, for those instances where petitioner is acting as a subcontractor, a copy of the Certificate of Capital Improvement which was properly executed by the customer and given to the prime contractor (20 NYCRR 541.5[b][4][i][a]). In this case, the 14 sales made by petitioner to various contractors during the six-month test period are all considered taxable since petitioner failed to submit contractor exempt purchase certificates and certificates of capital improvement, or the certificates which were submitted were untimely and not properly completed.

F. The three remaining sales claimed as nontaxable sales (*see*, Finding of Fact “11”) are also held to be taxable sales. The sale to St. James Plaza is taxable since petitioner failed to adduce an Exempt Organization Certificate for this customer. The sales to Café LaStrada and Markar Jewelers are taxable since no certificates of capital improvement were submitted and the evidence adduced regarding these two sales do not support that they were capital improvements. The “Conclusion” column of the attached Appendix A sets forth my determination for each of the 69 disputed sales which were addressed by the parties at the two small claims hearings.

G. Addressing next petitioner’s assertion that underreported gross sales and undocumented nontaxable sales should not be held 100% taxable, but instead, taxed at the same taxable sales percentage found as the result of this determination, I conclude that the Division properly held these sales to be taxable in full. Tax Law § 1132(c)(1) provides for a presumption that all sales “are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect the tax or the customer.” It is well established that every person required to collect tax

must maintain and make available for audit records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating tax due (Tax Law § 1138[a]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). In the absence of any evidence to the contrary, the Division, pursuant to Tax Law § 1132(c)(1), properly presumed that all of the receipts were subject to tax (*see, Matter of Petak v. Tax Appeals Tribunal*, 217 AD2d 807, 629 NYS2d 547; *Matter of Academy Beer Distribs. v. Commr.*, 202 AD2d 815, 609 NYS2d 108, *lv denied* 83 NY2d 759, 616 NYS2d 14). Furthermore, petitioner offered no credible explanation as to why there were no sales records for sales totaling \$773,963.00 (\$343,269.00 + \$330,694.00), which amount represented 36.5% of audited gross sales. To accept petitioner's proposition that these undocumented sales be taxed at the same taxable sales percentage as calculated pursuant to this determination would circumvent the audit process and actually reward those taxpayers who intentionally delete or discard taxable sales invoices from their records. I am not suggesting that petitioner intentionally deleted or discarded taxable sales invoices from its records, perhaps they were merely lost or misplaced; however, I make this point to show the valid reason for the presumption that all sales are taxable until proven otherwise.

H. Turning to petitioner's arguments concerning the computation of the use tax due on purchases incorporated into capital improvements, I find no merit to these assertions. While it is true that there may have been a more exact method to compute petitioner's purchases subject to use tax, it must be noted that petitioner has not presented any evidence to show that this aspect of

the audit was erroneous (*Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102). It was petitioner's failure to maintain proper records which made it necessary to estimate the amount of tax due (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, 78, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454) and neither exactness nor an item-by-item audit is required under the facts presented herein (*Matter of Day Surgicals v. State Tax Commn.*, 97 AD2d 865, 469 NYS2d 262). I also find, contrary to the assertion made in petitioner's final brief, that there is a sufficient relationship between materials purchased and gross sales to consider the Division's calculation of materials subject to use tax as reasonable.

However, it is noted that the calculation of purchases subject to use tax must be modified for a minor adjustment. To compute audited nontaxable sales, which figure was used to compute private capital improvement sales and ultimately purchases subject to use tax, the Division subtracted from audited gross sales those amounts which it found to be taxable sales, i.e., underreported sales of \$343,269.00, undocumented nontaxable sales of \$330,694.00 and reported taxable sales of \$91,548.00. The Division must also, in addition to the subtractions noted above, subtract disallowed nontaxable sales from audited gross sales to determine audited nontaxable sales. The disallowed nontaxable sales cannot be considered both a taxable sale and part of audited nontaxable sales.

I. Finally, addressing the issue of waiver of penalties and the reduction of interest to minimum rates, I find that there is reasonable cause for the waiver of penalties and the reduction of interest to minimum rates. It is easy to see how petitioner, given the nature of its varied sales, could misconstrue the sometimes complex requirements concerning sales to contractors and

capital improvement sales. Petitioner has consistently applied what it thought was the correct criteria for determining what constituted a capital improvement and appeared to have an honest misunderstanding of how sales to contractors were to be handled. Considering the entire record, I believe it is fair and equitable to waive all penalties and reduce interest to minimum rates.

J. The petition of Werner Glass & Mirror, Inc. is granted to the extent indicated in Conclusions of Law “D”, “H”, “I” and “Appendix A”, the Division of Taxation is directed to recompute the Notice of Determination dated October 7, 2002 consistent with this determination, and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
December 8, 2005

/s/ James Hoefer
PRESIDING OFFICER

Appendix A

Invoice number	Amount	Customer	Petitioner Asserts	Conclusion
1) D1126	\$50.00	Lake Ave. Antiq.	resale	resale
2) M871	\$65.00	Nizzette	capital imp.	taxable sale
3) D1082	\$220.00	Cannata	capital imp.	taxable sale
4) F1276	\$348.00	Fischer	n/a	Div. concedes cap. imp.
5) R1021	\$135.00	Griffin	capital imp.	taxable sale
6) S1393	\$100.00	Kelly	capital imp.	taxable sale
7) S1309	\$210.00	Sweeny	n/a	Div. concedes cap. imp.
8) S1236	\$208.00	St. James Plaza	tax exempt	taxable sale
9) N1356	\$42.00	NDA Constr.	resale	taxable sale
10) D1113	\$75.00	Cortes	n/a	Pet. concedes taxable sale
11) G975	\$100.00	Cortes	n/a	Pet. concedes taxable sale
12) N1244	\$264.00	NDA Constr.	resale	taxable sale
13) N1210	\$323.00	NDA Constr.	resale	taxable sale
14) N1290	\$40.00	NDA Constr.	resale	taxable sale
15) D1103	\$40.00	Betz	n/a	Pet. concedes taxable sale
16) R1010	\$55.00	Pagano	capital imp.	taxable sale
17) C171	\$450.00	EGM Constr.	resale	taxable sale
18) C1257	\$393.00	Café LaStrada	n/a	Div. concedes cap. imp.
19) C11968	\$115.00	Café LaStrada	capital imp.	taxable sale
20) B1395	\$180.00	Kundig Constr.	resale	taxable sale
21) B1010	\$18.00	Weingarten	n/a	Pet. concedes taxable sale
22) N1256	\$294.00	NDA Constr.	n/a	Div. concedes cap. imp.
23) B1312	\$48.00	Braiotta Studios	resale	taxable sale
24) M1599	\$70.00	Markar Jewelers	capital imp.	taxable sale

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Appendix A

Invoice number	Amount	Customer	Petitioner Asserts	Conclusion
25) C1534	\$24.00	On the Level Homes	resale	taxable sale
26) O4901	\$265.00	Totter	resale	taxable sale
27) G14593	\$18.00	Sama Millwork	resale	taxable sale
28) N14754	\$135.00	Pace	capital imp.	taxable sale
29) L14668	\$30.00	Perma Ceram Ent.	resale	resale
30) L14695	\$31.15	Wuhza Window	resale	taxable sale
31) O4916	\$178.00	Studley	capital imp.	taxable sale
32) I14631	\$35.00	Halowitch	capital imp.	taxable sale
33) S1320	\$129.00	Bucholz	capital imp.	taxable sale
34) O4963	\$95.00	Porciello	capital imp.	taxable sale
35) G4844	\$199.00	Porciello	capital imp.	taxable sale
36) V1455	\$41.98	VanHorn	n/a	Pet. concedes taxable sale
37) G1543	\$44.12	Godsell Constr.	n/a	Div. concedes exempt sale
38) G14580	\$149.00	Reynolds	capital imp.	taxable sale
39) I4829	\$135.00	McAvoy	capital imp.	taxable sale
40) O4964	\$280.00	Magistrate	capital imp.	taxable sale
41) G4862	\$112.00	Lake Ave. Antiq.	resale	resale
42) I4818	\$160.00	Chang	capital imp.	taxable sale
43) F1612	\$166.00	Forestbrook Homes	n/a	Div. concedes cap. imp.
44) C1537	\$70.38	Flo Kemp	resale	resale
45) H1710	\$71.62	Flo Kemp	resale	resale
46) I14749	\$9.99	Flo Kemp	resale	resale
47) F1482	\$51.22	Flo Kemp	resale	resale
48) F1483	\$48.02	Flo Kemp	resale	resale
49) F1610	\$120.97	Flo Kemp	resale	resale

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Appendix A

Invoice number	Amount	Customer	Petitioner Asserts	Conclusion
50) F1618	\$9.57	Flo Kemp	resale	resale
51) F1754	\$122.93	Flo Kemp	resale	resale
52) O4933	\$143.53	Flo Kemp	resale	resale
53) O5068	\$29.06	Flo Kemp	resale	resale
54) I14720	\$75.00	Klipstein	n/a	Pet. concedes taxable sale
55) I4808	\$89.00	D'Amato	capital imp.	taxable sale
56) R1037	\$179.00	Dery	n/a	Div. concedes cap. imp.
57) S1396	\$110.00	Desomma	capital imp.	taxable sale
58) A417	\$385.00	Assoc. Constr.	resale	taxable sale
59) 2504	\$96.00	Johnson	n/a	Pet. concedes taxable sale
60) I14689	\$84.30	Ellentuck	capital imp.	taxable sale
61) S1901	\$234.00	Shea	n/a	Div. concedes cap. imp.
62) F1765	\$15.82	Flo Kemp	resale	resale
63) S1758	\$185.00	Ioanna	n/a	Div. concedes cap. imp.
64) R1772	\$2,262.80	Rockmore Contr.	n/a	Div. concedes exempt sale
65) K1514	\$138.00	Kundig Contr.	resale	taxable sale
66) K1490	\$368.00	Kundig Contr.	resale	taxable sale
67) F1553	\$65.00	Kundig Contr.	resale	taxable sale
68) K1661	\$15.00	Kundig Contr.	resale	taxable sale
69) K1666	\$179.63	Kundig Contr.	resale	taxable sale